

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SECOND APPEAL No 192 of 1996

Hon'ble MR.JUSTICE Y.B.BHATT

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1. Whether Reporters of Local Papers may be allowed to see the judgements?
  2. To be referred to the Reporter or not?
  3. Whether Their Lordships wish to see the fair copy of the judgement?
  4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?
  5. Whether it is to be circulated to the Civil Judge?

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HIRAGAR AMARGAR

Versus

MER VASTA JETA

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Appearance:

MR MEHUL S. SHAH for SURESH M SHAH for Appellant

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CORAM : MR.JUSTICE Y.B.BHATT

Date of decision: 18/02/97

ORAL JUDGEMENT

1. This is a Second Appeal under section 100, CPC, wherein the appellant is the original obstructionist who had raised an obstruction in execution proceedings arising from the decree passed in favour of the first respondent and against the second respondent. In other words, the first respondent was a decree holder who sought to execute the decree for possession against the second respondent-judgement debtor, in which proceedings the present appellant had raised an obstruction.

2. Before proceeding with the merits of the present appeal it is necessary to examine the scope and ambit of an appeal under section 100, CPC.

3. The scope of section 100 CPC, and the powers of the High Court while exercising jurisdiction as a second appellate court are by now well demarcated and require no detailed discussion. The Supreme Court has, in the case of

(i) Ramaswamy Kalingaryar Vs. Mathayan Padayachi  
(AIR 1992 Supp (1) SCC page 712),

(ii) Kashibai w/o of Lachiram (2) 1995(7) JT (SC) 48  
and

(iii) Parsini (dead) through Legal Representatives Vs.  
Atma Ram (AIR 1996 SC 1558),

clearly reiterated the principle that the High Court cannot, while functioning as a second appellate court under section 100 CPC, upset the findings of fact recorded by the lower appellate court by reassessing the evidence, or reassess the qualitative value of such evidence on record, and thus cannot reverse such findings of fact. In fact, the High Court cannot interfere with such findings of fact even by examining or reappreciating the evidence from the aspect of "sufficiency of proof".

4. The present appellant, as an obstructionist, had filed an application exh.16 in the pending execution proceedings. It may be noted that although in the application and in the judgement and order of the executing court, this application Exh.16 has consistently been referred to as an application under Order 21, Rule 95, CPC. However, it appears that this is a misdescription, and the trial court as also the lower appellate court, including the parties to the proceedings, have dealt with the said application as if the same was an obstruction raised under Rules 97, 98, etc., of Order 21, CPC. The executing court by its order below Exhs.16 and 18 rejected the obstruction of the present appellant, and directed the execution proceedings to proceed further.

5. The obstructionist therefore filed a regular appeal, professed to be under section 96, CPC, before the lower appellate court. The lower appellate court also dismissed the said appeal on merits. Hence the present Second Appeal.

6. Before dealing with the present appeal on merits, certain factual aspects, which are relevant and pertinent, are required to be noted.

7. It is sought to be contended that the application of the appellant was one under Order 21, Rule 97 read with Rule 98, CPC, and that therefore it required to be decided on merits as if it were a suit, and could not have been decided in a summary manner. This objection and/or contention is taken merely for the sake of raising an arguable point. First of all, a perusal of the impugned order does not in any manner indicate that the same has been disposed of in a summary manner. It is a reasoned order dealing with all the contentions of the parties, and it is a decision on the merits of contentions taken by the respective parties before the court.

8. It is further sought to be contended that since such an application is required to be decided as if it were a suit, the appellant had a right to lead evidence in support of his grounds of obstruction, and this opportunity has been denied to him. Even this contention is misfounded for the simple reason that it is not merely sufficient to plead denial of opportunity to lead evidence. To sustain such a submission, the appellant must show that he desired to lead evidence in the court dealing with his obstruction application, and/or the Court so conducted the proceedings so as to prevent the applicant from leading evidence. In fact, on a specific query being put to learned counsel for the appellant, he was unable to indicate from the record or even from the judgement and order of the trial court (the executing court) that any application was tendered, or even that an oral submission was made for the purpose of availing of an opportunity to lead evidence. This is apparent from another significant fact, that it was for the first time in the lower appellate court, (in appeal from the judgement and order of the executing court), that the appellant gave an application for leading evidence. The lower appellate court rightly rejected the said application, dealing with the same on merits. This rejection order on the part of the lower appellate court is an independent order during the course of the appeal, which would confer upon the appellant an independent remedy. This remedy has not been availed of and that order has therefore become conclusive.

9. It is further to be noted that the proceedings under Order 21, Rule 97 to 101, deal only with the right

of the obstructionist to hold possession of the property which is the subject matter of execution proceedings. If any order adverse to the obstructionist is passed in such proceedings, it cannot possibly amount to denial of title of the obstructionist, unless a title has specifically been pleaded by way of justifying the right to possession. However, in the facts of the present case, it is the appellant's own case, which was even set forth before the executing court, that the obstructionist had some interest in the suit property, which interest is sought to be enforced by filing a suit for partition, which was then pending. It is, therefore, obvious from this assertion of the obstructionist himself, that what he claims is only a share in the undivided joint property, and therefore indirectly an interest in the suit property, which is far from having established a specific right to hold possession in respect of the specific property which is the subject matter of the execution proceedings.

10. Some other facts which have also weighed with the courts below are to the effect that the original decree which is the subject matter of the execution proceedings has already been confirmed by the High Court in a regular first appeal under section 96 CPC. Therefore, there is much substance in the finding recorded by the two courts below that the present obstruction application is merely an attempt to go behind the original decree confirmed by the High Court in appeal.

11. Another fact which requires to be noted is that both the courts below have recorded a finding of fact that the obstruction application appears to have been caused by, supported by and/or is a result of collusion between the obstructionist-appellant and the judgement debtor. This conclusion is a natural corollary of the admitted fact that the appellant-obstructionist was represented by the same advocate who represented the judgement debtor in the execution proceedings.

12. Another aspect which requires to be noted is that the obstruction raised by the present appellant is not raised in respect of, and does not arise out of possession in respect of land or property which is the subject matter of the execution proceedings. In other words, the obstruction is raised only as against further proceedings of execution proceedings, but such obstruction is in respect of possession held in other land and property, which is not the subject matter of the execution proceedings. Thus, the obstruction does not pertain specifically to the right of the obstructionist,

specifically in respect of such land which is the subject matter of the execution proceedings.

13. Although it may not be strictly necessary for the purpose of deciding the present appeal, I am constrained to agree with the observations and findings of the courts below that the obstructionist is merely resorting to litigation, and taking recourse to various contentions and obstructions, solely with a view to defeat the decree holder in the enjoyment of the fruits of the decree in execution. In this context a reference to a Supreme court decision in the case of KRISHNA SINGH Vs. MATHURA AHIR (AIR 1982 SC 686) is useful. No doubt, this decision is not specifically applicable to the facts and circumstances of the present case. However, what is required to be noted is that the supreme Court had occasion to make observations of a general nature to the effect that the law cannot be resorted to, and the procedural aspects of legal proceedings cannot be permitted, "to perpetuate injustice".

14. Learned counsel for the appellant seeks to place reliance upon a decision of the Supreme court in the case of BABULAL Vs. RAJ KUMAR (AIR 1996 SC 2050). This decision lays down the ratio that an adjudication was required to be conducted under Order 21, Rule 98 before the executing court could dismiss an application of an obstructionist. There cannot be any controversy on this principle. However, the crux of the matter and the reason behind the ratio laid down is clearly discernible from the observation made in para 6 of the said decision. The Supreme court has observed in the said paragraph that "dispossession of the applicant from the property in execution is not a condition for declining to entertain the application". On the facts of the case it must be noted firstly, that the executing court has not declined to entertain the application, neither has it been rejected on the ground that the applicant has not been dispossessed from the property in execution. In fact the application has been decided, and has been decided on the merits of the objections raised. The said decision, therefore, is of no assistance to the appellant.

15. Learned counsel for the appellant further sought to rely upon a decision of a single Judge of this court in the case of CHANDRAVATI SOCIETY Vs. BHAIKAVNATH EDUCATION & CULTURAL SOCIETY TRUST & ORS. (34(1) GLR 116). It must, however, be noted that this decision deals with the rights of the decree holder vis-a-vis the rights of the obstructor, in the context of Order 21, Rules 96 and 103. The ratio laid down is that third

parties cannot file a suit for injunction, and that in such a suit, the proceedings under Order 21, Rule 97 cannot be stayed. This decision further goes on to hold that so far as the legal rights of the decree holder ( in execution proceedings) are concerned, such rights vis-a-vis the obstructor can be decided under Rules 97, 98, etc, and that it is also open to the decree holder to resort to a remedy of instituting an independent suit to recover possession of the property which is a subject matter of the execution, against such third party who may be in possession. Obviously, this remedy is even otherwise available to a decree holder under ordinary civil law, and the same is not and cannot be barred. Ultimately, the ratio laid down is only to the effect that in an independent suit filed by third parties for injunction, it is not open to a civil court in such a suit, to stay further proceedings pending in the executing court under Order 21, Rule 97, CPC. In my opinion, this decision and the ratio laid down therein has no application to the facts of the present case.

16. In the premises aforesaid, I am satisfied that no substantial question of law arises in the present appeal within the meaning of section 100, CPC, and the same is, therefore, dismissed.

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